



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 17, 2003

Ms. Hadassah Schloss  
Open Records Administrator  
Texas Building and Procurement Commission  
P.O. Box 13047  
Austin, Texas 78711

OR2003-4975

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184414.

The Texas Building and Procurement Commission (the "commission") received a written request for records pertaining to "a complaint or concern submitted regarding the eligibility for HUB status for either Randall Technology Consulting and/or Randall-Joiner Consulting." You state that some of the responsive information is being released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101 and 552.111 of the Government Code.

The informer's privilege, incorporated into the Public Information Act by section 552.101, has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). *See also Roviario v. United States*, 353 U.S. 53, 59 (1957). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres."

Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The entire statement of an informant may be withheld where it would tend to identify him or her. Open Records Decision No. 434 (1986).

You inform us that the information at issue contains a report of a violation of section 2161.231 of the Government Code, which provides criminal penalties for a person who intentionally applies for status as a historically underutilized business (“HUB”) when the applicant is not a HUB. We note that the commission is the administrative agency with the duty to oversee the HUB program and that the commission is authorized to conduct audits of certified businesses to verify that the information submitted by the business is accurate. See 1 T.A.C. § 111.21. We therefore conclude that the informer’s privilege is applicable in this instance. Upon review of the documents at issue, we agree that the information you have marked in Attachment B may be withheld under section 552.101 in conjunction with the informer’s privilege.

We also note that Attachment B contains an e-mail address. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of *a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

The e-mail address contained in Attachment B consists of a private e-mail address that must be withheld pursuant to section 552.137 unless the commission receives an affirmative consent to release from the person to whom an e-mail address belongs.

You next contend that a letter from the commission dated August 16, 2002 and an e-mail communication dated August 14, 2002 are excepted from required public disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.) (emphasis added); see also *City of Garland v.*

*Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998), *aff'd*, 22 S.W.3d 351 (Tex. 2000).

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). After reviewing the contents of Attachment C, we conclude that letter from the commission dated August 16, 2002 is purely factual and therefore must be released in its entirety. On the other hand, we conclude that factual information contained in the e-mail communication dated August 14, 2002 is inextricably intertwined with material involving advice, opinion, or recommendation and therefore may be withheld in its entirety pursuant to section 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CMN/RWP/seg

Ref: ID# 184414

Enc: Submitted documents

c: Ms. Lynne Randall  
President  
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(w/o enclosures)